Supreme Court, U.S.
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No. 06-773

In The
Supreme Court of the United States

CALVIN CLARK,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Petition For Writ Of Certiorari To The Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

MARK W. LYONS
Counsel of Record
1221 Locust St., Ste. 1000
St. Louis, Missouri 63130
(314) 621-1800
Fax: (314) 621-4222

ELLEN H. RIBAUDO
120 S. Central, Ste. 130
St. Louis, Missouri 63105
(314) 862-4332
Fax: (314) 862-8050
Attorneys for Petitioner Calvin Clark

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Does the United States Constitution proscribe, or limit the use of, evidence in a criminal sentencing hearing before a jury that is offered to prove two prior criminal acquittals were erroneous and, therefore, warrant a harsher punishment?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

CALVIN CLARK, an individual presently incarcerated by the State of Missouri;

STATE OF MISSOURI, represented by Jeremiah "Jay" Nixon, attorney general of the State of Missouri.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

State v. Clark, 197 S.W.3d 598 (Mo. banc 2006). Appendix A-1.

State v. Clark, 2005 WL 3286017, Mo.App. E.D., December 06, 2005 (Not Reported in S.W.3d). Appendix A-11.

BASIS FOR SUPREME COURT JURISDICTION

The Missouri Supreme Court entered its judgment on August 8, 2006. Appendix A-1. Petitioner Calvin Clark seeks review of that judgment on a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. 1257(a) to review on a writ of certiorari the judgment of the highest court of a State where the validity of a statute of the State is drawn in question on the ground of its being repugnant to the Constitution. Under Supreme Court Rule 10(c) this Court may grant review on a writ of certiorari when a state court has decided an important question of federal law that has not been, but should be, settled in this Court.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment V;

Constitution of the United States, Amendment VI;

Constitution of the United States, Amendment XIV.

STATEMENT OF THE CASE

A jury found Calvin Clark guilty of first degree assault, armed criminal action and attempted robbery on February 25, 2004. A separate sentencing phase was then conducted pursuant to Missouri Revised Statute § 557.036 (2004), which allows for bifurcated jury trials in non-capital cases. The State of Missouri first presented evidence that had previously been offered in cause number 021-2012B, in the 22nd Judicial Circuit, City of St. Louis, Missouri, in which Mr. Clark was acquitted of a triple homicide and assault in the first degree. Irving Massie testified that on April 16, 2001, he was shot twice in the head. Massie also identified Mr. Clark as the man who shot him that day. However, at the previous trial, in which Mr. Clark was acquitted, Massie had identified Mr. Clark's brother, Adrian Bowman, and not Mr. Clark, as the man who shot him. The State also placed a forensics expert on the stand to testify that the shell casings seized in connection with the present assault on Jarvis Hardimon matched shells found at the scene of the triple homicide.

The State then presented several witnesses who identified Mr. Clark as the killer in another case that originally was count I of the present indictment but was later severed. These witnesses testified that Appellant was responsible for the murder of one Victor Killibrew. In cause number 021-2464, in the 22nd Judicial Circuit, City of St. Louis, Missouri, Mr. Clark was also acquitted of the murder of Victor Killibrew.

The jury recommended sentences on the three counts as follows: On count III, first degree assault, Mr. Clark was sentenced to life imprisonment; On count IV, armed criminal action, he was sentenced to thirty (30) years

imprisonment; On count V, robbery, he was sentenced to fifteen (15) years imprisonment. The court imposed the recommended sentences and ordered that they be served consecutively. This sentence of life plus forty-five years constituted the maximum sentence the jury could impose by statute for the crimes charged.

Mr. Clark appealed his conviction to the Missouri Court of Appeals for the Eastern District arguing that the State should have been precluded from presenting evidence of his prior acquittals during a subsequent sentencing phase. App. 12. In affirming Mr. Clark's conviction the court held that, "As the United States Supreme Court reasoned in *Watts*, 'a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.'" App. 21, quoting *United States v. Watts*, 519 U.S. 148, 157 (1997).

The Eastern District Court of Appeals granted Mr. Clark's motion for transfer to the Missouri Supreme Court pursuant to Missouri Supreme Court Rule 83.02 on January 25, 2006. On August 8, 2006 the Missouri Supreme Court handed down its opinion affirming the lower court decision.

The Missouri Supreme Court held that there was no error in allowing evidence of prior acquittals in a subsequent sentencing phase. App. 3. The court first noted that, in general, "the court has discretion during the punishment phase of trial to admit whatever evidence it deems to be helpful to the jury in assessing punishment." App. 6. The Missouri Supreme Court then turned to the specific question of prior acquittals, which it described as an "issue

of first impression in this state." App. 7. The court found this Court's opinion in *Watts* to be controlling on the issue of prior acquitted conduct. App. 7. The court applied *Watts* and found that because Mr. Clark was sentenced within the statutory maximum for his offenses any evidence of his prior acquittals at sentencing was subject to a lower standard of proof than beyond a reasonable doubt. App. 8. Therefore, the facts of his prior acquittals could be relitigated under a preponderance standard without running afoul of the Fifth or Sixth Amendments. App. 9-10.

ARGUMENT

THE MISSOURI SUPREME COURT HAS WRONGLY DECIDED AN IMPORTANT ISSUE OF STATE AND FEDERAL SENTENCING LAW BASED ON THE MISPERCEPTION THAT THIS COURT HAS PREVIOUSLY RULED ON THE ISSUE

1. Double Jeopardy and Collateral Estopple

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This protection is made applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The right to be free from double jeopardy is a fundamental constitutional right.

Additionally, a fact that has once been determined by a valid and final judgment cannot again be litigated between the same parties in a future action. *Ashe v. Swenson*, 397 U.S. 436 (1970). Any issues previously

adjudicated are collaterally estopped in the future litigation. A prior judgment of acquittal in a criminal case is usually based on a general verdict. In the case of a Missouri first degree murder acquittal the crucial inquiry for collateral estoppel purposes at the second trial should center on which facts of the acquittal are barred from admission in a subsequent action. *State v. Johnson*, 598 S.W.2d 123 (Mo. banc 1980).

A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter. Revised Missouri Statute § 565.020.1 (2000). A person commits the crime of murder in the second degree if he . . . knowingly causes the death of another person. Revised Missouri Statute § 565.021.1(1). Both of these offenses were submitted to the jury in Mr. Clark's first trial. The fact that the jury was presented with both first degree murder and second degree murder in the two previous trials means that it is impossible for the jury to have acquitted based on a finding that there was no deliberation. Therefore, the acquittals indicated that the jury found that the State had failed to prove identity. The substantive evidence presented during the penalty phase of the instant case was exclusively identity evidence. Furthermore, the evidence in the first trial, in which Irving Massie failed to identify Mr. Clark, and in this penalty phase, demonstrated that the killings were execution style and that the killer had voiced an intent to kill. Therefore, the first jury could not have acquitted on any issue other than identity, and the prosecution should have been estopped from presenting additional evidence of identity during the penalty phase of this trial.

2. *United States v. Watts* Provides No Authority for the Redefinition of Acquittal

In *State v. Clark*, 197 S.W.3d 598 (Mo. banc 2006) the Missouri Supreme Court held, as an issue of first impression, that in bifurcated jury trials under Revised Missouri Statute § 557.036.3 (2004) sentencing phase evidence could include evidence tending to prove that the defendant actually committed a crime for which he was previously acquitted. Finding no Missouri precedent on the issue, the court rested its holding on *United States v. Watts*, 519 U.S. 148 (1997).

The narrow and questionable holding in *Watts* provides no coherent intellectual basis on which to reconceive the very nature of an acquittal.

This Court recently discussed the scope of *Watts* in *United States v. Booker*, 125 S.Ct. 738 (2004). The *Booker* majority wrote that, "*Watts*, in particular presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases." *Id.* at 754, FN. 4.

In addition to being of limited precedential value in the context of federal sentencing, the procedural context of *Watts* is the apple to Missouri's orange. First, *Watts* did not involve jury sentencing. *Watts*, 519 U.S. at 150. Rather, the two cases decided in *Watts* involved application of the Federal Sentencing Guidelines by a judge. *Id.* The Court in *Watts* based its opinion on the view that it is "well established that a sentencing judge may take into account facts introduced at trial relating to other charges even ones of which the defendant has been acquitted." *Id.* at

152, quoting *United States v. Donelson*, 695 F.2d 583, 590 (C.A.D.C. 1982). *Watts* never came close to addressing the situation of a jury hearing evidence in a bifurcated trial.

The second critical distinction is that the acquittals in *Watts* were from the *same trials* as the convictions for which sentence was being imposed. *Watts*, 125 U.S. at 149-51. The Court's reasoning makes plain that this fact was not incidental to its ultimate holding: "As we explained in *Witte*, however, sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction." *Id.* at 154. It was simply not the case in *Watts* that evidence was adduced at sentencing in order to prove that an unrelated crime was previously committed by the defendant that resulted in a prior, erroneous, acquittal. This was exactly the situation in Mr. Clark's case. Furthermore, a *Clark*-like sentencing hearing could *never* occur in Federal Court as federal juries are never responsible for sentencing the defendant.

Third, *Watts* has absolutely nothing to do with a situation such as this where the prosecution put on witnesses and presented evidence from completely unrelated crimes in arguing for the harshest possible sentence. At the very most, *Watts* might authorize a federal judge to consider all the evidence she previously heard during a trial in order to mete out an appropriate Guidelines sentence based on the relevant conduct of the instant offense.

Finally, the concerns expressed by Justice Kennedy in his *Watts* dissent are placed in high relief by the facts of the present appeal:

> It must be noted that the case raises a question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system. We have not decided a case on this precise issue, for it involves not just prior criminal history but conduct underlying a charge for which the defendant was acquitted. At several points the *per curium* opinion shows hesitation in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted. The distinction ought to be confronted by a reasoned course of argument, not by shrugging it off.

Watts, 519 U.S. at 170 (Kennedy, J., dissenting from failure to grant full briefing and oral argument).

3. The Missouri Supreme Court's Interpretation of *Watts* Grossly Distorts the Meaning of Innocent Until Proven Guilty

The *Clark* Court's opinion suggests that a defendant is presumed innocent until a jury finds him either guilty or not quite guilty enough. Either way, for all practical purposes, the presumption of innocence is apparently lost at some stage in the trial. Federal courts that have examined this tension in light of subsequent United States Supreme Court precedent have ruled that a verdict of not guilty, rendered by a jury, does in fact hold a privileged place in American law that is not analogous to prior uncharged acts or any other sentencing fact that may be proven by a mere preponderance of the evidence.

In *United States v. Pimental*, 367 F.Supp.2d 143 (Gertner, D.J. D.Mass. 2005) the district court found that

> *United States v. Booker* substantially undermines the continued vitality of *United States v. Watts* both by its logic and by its words. It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, *Blakely v. Washington*, 542 U.S. 296 (2004), and *also* conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing. The jury is intended to be the centerpiece of the criminal justice system. Determining more than actual truth, guilt, or innocence, its decision represents a popular conception of a just verdict. In effect, juries rule on legal guilt, guilt determined by the highest standard of proof we know, beyond a reasonable doubt. And when a jury acquits a defendant based on that standard, one would have expected no additional punishment would follow.

Id. at 150 [internal citation omitted]. For these reasons the court excluded from its sentencing determination, under the Federal Guidelines, any of the counts on which the defendant had been acquitted. Again, this situation is very different from the instant appeal in that these were present, not prior, acquittals and sentencing was by a judge, not a jury. However, this is the very situation on which the Missouri Supreme Court has based its interpretation of Missouri law. Furthermore, the features that distinguish a Missouri jury trial from a federal sentencing determination only add force to Judge Gertner's argument. The jury that sentenced Mr. Clark was asked to reexamine facts that a prior jury had already determined. Mr. Clark was placed in jeopardy for those acts once before and all of the conditions, context and nuance of the prior trial had resulted in a verdict of acquittal from a properly empaneled jury of his peers. If a

federal judge should not be second guessing the jury in a trial over which she presides, then a subsequent Missouri jury should certainly not be put in a position to amend a prior jury's findings of fact based on a tacked on mini-trial. "To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its effort makes no sense – as a matter of law or logic." *Id.* at 153.

Similarly, in *United States v. Coleman*, 370 F.Supp.2d 661 (S.D. Ohio 2005), a district court held that, "At sentencing, acquitted conduct should always be considered using a reasonable doubt standard; otherwise, a defendant's Sixth Amendment right to a jury trial is eviscerated." *Id.* at 668. The district court went on to characterize the practice of proving up acquitted conduct at sentencing under a sub-reasonable doubt standard as an unacceptable "theoretical contradiction." *Id.* at 669. The opinion also reasoned that given the limited initial holding of *Watts*, and subsequent Supreme Court precedent that further reduced its precedential value, *Watts* did not provide a constitutional justification for curtailing Sixth Amendment protection at sentencing. *Id.* at 669.

CONCLUSION

Mr. Clark asks that this Court grant his petition for writ of certiorari to resolve this important issue of State and Federal sentencing law.

Respectfully submitted,

MARK W. LYONS
Counsel of Record
1221 Locust St., Ste. 1000
St. Louis, Missouri 63130
(314) 621-1800
Fax: (314) 621-4222

ELLEN H. RIBAUDO
120 S. Central, Ste. 130
St. Louis, Missouri 63105
(314) 862-4332
Fax: (314) 862-8050
Attorneys for
Petitioner Calvin Clark

November 2006

Opinion

Supreme Court of Missouri

Case Style: State of Missouri, Respondent v. Calvin Kevin Clark, Appellant.

Case Number: SC87473

Handdown Date: 08/08/2006

Appeal From: Circuit Court of the City of St. Louis, Hon. Julian L. Bush

Counsel for Appellant: Mark W. Lyons and Ellen H. Ribaudo

Counsel for Respondent: Alison K. Brown and Shaun J. Mackelprang

Opinion Summary:

On March 25, 2001, Calvin Kevin Clark shot a man carrying about $1,500 and attempted to rob him. At the guilt phase of the trial, the jury found Clark guilty of first-degree assault, armed criminal action and attempted first-degree robbery. At the punishment phase of the trial, the state introduced evidence of prior crimes of which Clark had been acquitted. Clark appeals, contending the trial court erred in permitting the state to introduce evidence of his prior crimes.

AFFIRMED.

Court en banc holds: (1) Section 557.036.3, RSMo Supp. 2004, permits evidence supporting or mitigating punishment to be presented at the punishment phase of the trial. Such evidence may include evidence concerning the defendant's history and character.

(2) As a general rule, the trial court has discretion during the punishment phase of trial to admit whatever evidence

it deems helpful to the jury in assessing punishment. Both the state and the defendant may introduce any evidence pertaining to the defendant's character to help the jury assess punishment in a penalty phase setting. Even evidence of a defendant's prior unadjudicated criminal conduct may be heard by the jury in the punishment phase of a trial.

(3) In *United States v. Watts*, 519 U.S. 148 (1997), the Supreme Court found that an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. *Id.* at 157. *Watts* also held that a jury's verdict of not guilty does not prevent the sentencing court from considering conduct underlying the charge, so long as that conduct has been proved by a preponderance of the evidence.

(4) The punishment phase of a trial generally is subject to a lower standard of proof than the guilt phase of the trial. As Clark did not receive enhanced sentences, any facts that would have tended to assess his punishment within that range were not required to be found beyond a reasonable doubt by a jury. Because those facts were subject to a lower standard of proof than beyond a reasonable doubt, the state was not precluded from introducing evidence of Clark's prior incidents during the penalty phase of the trial.

Citation:

Opinion Author: PER CURIAM

Opinion Vote: AFFIRMED. All concur.

Opinion:

PER CURIAM[1]

Calvin Kevin Clark shot a man carrying about $1,500 and attempted to rob him. At the guilt phase of the trial, the jury found Clark guilty of first degree assault, armed criminal action, and attempted first degree robbery. At the punishment phase of the trial, the State introduced evidence of prior crimes for which Clark had been acquitted. The jury recommended sentences of life imprisonment, 30 years, and 15 years for first degree assault, armed criminal action, and attempted first degree robbery, respectively. The trial court imposed the recommended sentences, to be served consecutively. Clark contends the court erred in permitting the State to introduce evidence of his prior crimes. No error was committed. The judgment is affirmed.

Standard of Review

The trial court retains broad discretion over the admissibility of evidence. Error will be found only if this discretion was clearly abused. A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Johns*, 34 S.W.3d 93, 111 (Mo. banc 2000).

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[1] This Court transferred this case after decision by the Court of Appeals, Eastern District, authored by the Honorable Nannette A. Baker. *Mo. Const. article V, section 10.* Parts of that opinion are incorporated without further attribution.

Evidence of this Crime

Clark opened the passenger side door of a vehicle and sat next to the driver. The driver told Clark to get out of the car and reached across Clark's body to open the door and push him out. Clark brandished a gun and refused to get out. As the driver started to exit the car, Clark shot him, demanded money, walked around the car, and shot him again. They struggled as Clark tried to go through the driver's pockets. The driver managed to get back into his car and drive away. As he drove away, Clark shot him two more times in the back through the rear window.

Evidence of Prior Crimes

During the second phase of the trial, the State introduced evidence that Clark had committed four murders.

With respect to an April 16, 2001, incident, Irving Massie testified he and three others were painting a house. Clark and another came into the house, armed with guns. Clark shot Massie twice in the back of the head. Later that day, the police found two of the other painters at the house and the third at another location. All three were dead. At both locations, police found 9 mm shell casings. Jennifer Wesson testified as to a separate incident that occurred on November 2, 1999. She testified Clark shot and killed a man in the area of a liquor store. A store clerk corroborated Wesson's testimony.

Other Evidence

A police officer testified that he examined the ballistic evidence seized in both places of the April 16, 2001, incident and the shell casings in this case. He stated that all

the shell casings seized matched each other, "so they were positive and definitely fired from the same firearm."

The defense noted Clark was found not guilty of both the April 16, 2001, incident and the November 2, 2999, incident by separate juries. Additionally, a defense witness testified that during the trial of Clark's co-actor for the April 16, 2001, incident Massie testified that Clark was the man who shot him. However, when asked in court to point out the individual who shot him, Massie identified Clark's co-actor.

Discussion

In his sole point relied on, Clark argues that the trial court erred by allowing the State to introduce evidence of acquitted crimes during the penalty phase of the trial. Section 557.036.3, RSMo Supp. 2004,[2] states:

> If the jury at the first stage of a trial finds the defendant guilty of the submitted offense, the second stage of the trial shall proceed. The issue at the second stage of the trial shall be the punishment to be assessed and declared. Evidence supporting or mitigating punishment may be presented. Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and the *history and character of the defendant*. (Emphasis added)

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[2] All other statutory references are to RSMo 2000, unless otherwise noted.

As a general rule, the trial court has discretion during the punishment phase of trial to admit whatever evidence it deems to be helpful to the jury in assessing punishment. *State v. Winfield,* 5 S.W.3d 505, 515 (Mo. banc 1999); *State v. Kinder,* 942 S.W.2d 313, 331 (Mo. banc 1996). Both the State and the defendant may introduce any evidence pertaining to the defendant's character in order to help the jury assess punishment in a penalty phase setting. *State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005). Even evidence of a defendant's prior unadjudicated criminal conduct may be heard by the jury in the punishment phase of a trial. *Winfield*, 5 S.W.3d at 515; *see also State v. Ferguson*, 20 S.W.3d 485, 500 (Mo. banc 2000) (holding that admitting unadjudicated bad acts during the penalty phase did not violate due process).

In this case, the jury found Clark guilty. Afterwards, during the penalty phase of the trial, the State introduced evidence that Clark shot five other individuals, killing four of them – three in a triple homicide, one in a separate incident. The State also introduced evidence that all those individuals were shot with the same gun that Clark used to shoot the victim in this case. Clark stood trial for these shootings in two separate trials and was found not guilty both times.

The State introduced Clark's previous acquittals during the second phase of the trial to support the State's request that Clark be sentenced to the maximum terms available for his crimes, not to determine whether Clark was guilty of shooting the victim. The trial court took judicial notice of Clark's earlier acquittals in open court before the jury. In the trial's sentencing phase Clark's counsel and the state reminded the jury of the acquittals in opening statement and closing argument.

Whether the State can introduce evidence of Clark's previous acquittals during the penalty phase is an issue of first impression in this state. The United States Supreme Court, however, directly addressed this issue in *United States v. Watts*, 519 U.S. 148 (1997). In *Watts*, the Court found that an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. *Id.* at 157. *Watts* also held that a jury's verdict of not guilty does not prevent the sentencing court from considering conduct underlying the charge, so long as that conduct has been proved by a preponderance of the evidence. *Id.* The Supreme Court based its holding, in part, on 18 U.S.C. Section 3661, which provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." *See Watts*, 519 U.S at 151. Much like the United States Code, section 557.036.3, RSMo Supp. 2004, allows the sentencing trial court to consider "[e]vidence supporting or mitigating punishment." "Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant." *Id.*

In *Watts*, the Supreme Court reasoned that an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt. 519 U.S. at 155. An acquittal is not a finding of any fact. *Id.* An acquittal can only be an acknowledgment that the government failed to prove an

essential element of the offense beyond a reasonable doubt. *Id.* Without specific jury findings, no one can logically or realistically draw any factual finding inferences. *Id.* As such, the Supreme Court held that an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. *Id.*; *Dowling v. United States*, 493 U.S. 342, 349 (1990). In *Jaco*, this Court held that the punishment phase of a trial is generally subject to a lower standard of proof than the guilt phase of the trial. 156 S.W.3d at 780. In *Jaco*, the defendant's 20-year sentence was within the original, unenhanced range of punishment, which was 10 to 30 years or life imprisonment for abusing and causing the death of her 13-month-old child. *Id.* at 777, 780. In *Jaco*, the court found that neither *Ring v. Arizona*, 536 U.S. 584 (2002), nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that a jury is required to find facts beyond a reasonable doubt to impose a sentence that is within the unenhanced range of punishment for an offense. *Id.* at 780. Instead, under *Ring* and *Apprendi*, facts that are the functional equivalent of elements of offenses, such as a statutory aggravating circumstance that is required for eligibility for the death penalty, must be found beyond a reasonable doubt. *Id.*; *see also Ring*, 536 U.S. at 602; *Apprendi*, 530 U.S. at 482-83. This Court held that since the defendant's sentence was within the original unenhanced range of punishment, any facts that would have tended to assess her punishment within that range were not required to be found beyond a reasonable doubt by a jury. *Jaco*, 156 S.W.3d at 780-81.

Much like the defendant in *Jaco*, Clark's sentences were within the original unenhanced range of punishment. The

jury found Clark guilty of assault in the first degree, a class A felony, armed criminal action, an unclassified felony, and attempted robbery in the first degree, a class B felony. The authorized term of imprisonment for a class A felony is a term of years not less than ten years and not to exceed 30 years, or life imprisonment. *Section 557.011.1(1).* The authorized term of imprisonment for a class B felony is a term of years not less than five years and not to exceed 15 years. *Section 557.011.1(2).* Under section 571.015.1, an individual convicted of armed criminal action shall be punished by imprisonment by the department of corrections and human resources for a term of not less than three years. The statute specifies a minimum sentence of three years but does not state a maximum penalty. *State v. Norton*, 949 S.W.2d 672, 678 (Mo. App. 1997). The absence of a stated maximum penalty merely indicates a legislative intent that a defendant convicted of the offense may be sentenced to any term of years above the minimum, including life. *Thurston v. State*, 791 S.W.2d 893, 895 (Mo. App. 1990). Since Clark was sentenced to life imprisonment on the assault count, 30 years on the armed criminal action count, and 15 years on the attempted robbery count, all the sentences were within the original unenhanced range of punishment.

As Clark did not receive enhanced sentences, any facts that would have tended to assess his punishment within that range were not required to be found beyond a reasonable doubt by a jury. Since those facts were subject to a lower standard of proof than beyond a reasonable doubt, the State was not precluded from introducing evidence of Clark's prior incidents during the penalty phase of the trial. *See Watts*, 519 U.S. at 155. As the Supreme Court reasoned in *Watts*, "a jury's verdict of acquittal does not

prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. As such, the trial court did not err by allowing the State to introduce evidence of Clark's prior acquittals during the penalty phase of the trial.[3]

The judgment is affirmed.

All concur.

Separate Opinion: None

[3] As previously noted, the judge and attorneys mentioned Clark's acquittals to the jury numerous times. Clark did not request that a jury instruction be given clarifying that the jury could consider the evidence of the other incidents solely for the purpose of determining the history and character of the defendant. Nor did Clark request any other instruction concerning the incidents. The Court does not decide whether any such instruction is appropriate.

Opinion

Missouri Court of Appeals

Eastern District

Case Style: State of Missouri, Respondent v. Calvin Kevin Clark, Appellant

Case Number: ED84783

Handdown Date: 12/06/2005

Appeal From: Circuit Court of City of St. Louis, Hon. Julian Bush

Counsel for Appellant: Nellie Ribaudo and Mark Lyons

Counsel for Respondent: Alison Brown

Opinion Summary:

Calvin Kevin Clark appeals from the circuit court's judgment entered after a jury convicted him of first-degree assault, armed criminal action and attempted robbery. Respectively, the trial court sentenced Clark to consecutive sentences of life imprisonment, thirty years and fifteen years. Clark alleges that the trial court erred in allowing the state to introduce evidence of acquitted crimes during the sentencing phase of the trial.

AFFIRMED.

Division Four holds: The trial court did not abuse its discretion when it allowed the state to introduce evidence of acquitted crimes during the sentencing phase of the trial. A jury's verdict of acquittal does not prevent the court, in the sentencing phase of the trial, from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.

Citation:

Opinion Author: Nannette A. Baker, Presiding Judge

Opinion Vote: AFFIRMED. Dowd, Jr., J., and Sullivan, J., concur.

Opinion:

Calvin Kevin Clark ("Defendant") appeals from the judgment entered after a jury found him guilty of first degree assault, armed criminal action, and attempted first degree robbery. The trial court sentenced Defendant to consecutive terms of life imprisonment for first degree assault, thirty years for armed criminal action, and fifteen years for attempted first degree robbery.

In his sole point on appeal, Defendant contends that the trial court erred by allowing the State to introduce evidence of his prior acquittals during the sentencing portion of the trial. We find no error and affirm.

BACKGROUND

The evidence presented at trial viewed in the light most favorable to the verdict is as follows:

On the evening of March 24, 2001, Jarvis Hardimon ("Hardimon") picked up his girlfriend, Jennifer Wesson ("Wesson"), from her home. They drove to Cahokia, Illinois to watch a few movies at Hardimon's friend's house. Hardimon then drove Wesson home, arriving at around 4:00 A.M. Hardimon estimated that when he arrived at Wesson's home, he was carrying $1,500.00 in cash.

When Hardimon got back into his car, after walking Wesson to her home, the Defendant opened the passenger side door and sat down next to Hardimon. Hardimon told Defendant to get out of the car and reached across Defendant's body to open the door and push him out. Defendant then brandished a 9 millimeter gun. Defendant refused to exit the vehicle. As Hardimon started to exit the car, Defendant shot him in the chest.

Hardimon lost his balance and fell out of the car and onto a nearby fence. Defendant told Hardimon to give him the money, got out of the vehicle, walked around to Hardimon, and shot him again. Hardimon and Defendant struggled as Defendant tried to go through Hardimon's pockets. Hardimon managed to get back into his car and drive away. As Hardimon drove away, the Defendant shot Hardimon two more times in the back through the rear window.

Hardimon was hospitalized for six days. While in the hospital, the police contacted him. Hardimon identified Defendant from a photo array as the man who shot him. Hardimon also identified Defendant during a subsequent line-up and at trial.

The trial began on May 24, 2004. During the first phase of the trial, although Wesson testified that she did not see the actual shooting, she testified that she saw the Defendant before and after the shooting. The State presented testimony from police officers and medical experts detailing the crime scene and the extent of Hardimon's injuries.

Defendant also testified that he was in no way involved in the incident. At the close of the first phase of the trial, the jury returned a verdict of guilty as to first degree assault, armed criminal action, and attempted first degree robbery.

During the second phase of the trial, the State introduced evidence that Defendant had committed four murders. The State introduced the testimony of Irving Massie ("Massie"), Police Officer Mark Karpinski ("Officer Karpinski"), William Dudley ("Dudley"), Wesson, Kimberly Clerk ("Clerk"), Police Officer Dennis Conway ("Officer Conway"), and Hardimon.

Massie testified that on April 16, 2001, he, David Johnson ("Johnson"), Michael Hays ("Hays"), and Bruce Smith ("Smith") were painting Smith's house at 4320 Farlin, St. Louis, when Adrian Bowman ("Bowman") and Defendant came into the house, armed with guns. Massie identified Defendant as the person who shot him twice in the back of the head that day.

On April 16, 2001, the police found Johnson and Hays deceased and Massie severely injured in the kitchen of Smith's house. On the same day, the police found Smith deceased at 4117 Clarence, St. Louis. Officer Karpinski testified that he examined the homicide scene of Smith and seized six 9 mm shell casings from around Smith's body. Dudley testified that on April 16, 2001, as a St. Louis Police Department evidence technician, he seized the 9 mm shell casings from the kitchen of Smith's house where the police found Johnson, Hays, and Massie.

Further, Wesson testified as to a separate incident that occurred more than a year before on November 2, 1999. Wesson testified that on November 2, 1999 she witnessed the shooting and killing of Victor Killebrew in the area of Ron's Liquor store at 4143 Newstead, St. Louis. On the stand, Wesson identified Defendant as the party who shot and killed Victor Killebrew that day. Clerk's testimony corroborated Wesson's testimony; she also identified

Defendant as the individual who shot and killed Victor Killebrew on November 2, 1999.

Officer Conway testified that he examined the ballistic evidence seized by Officer Karpinski in Smith's homicide, by Dudley in the triple shooting resulting in the double homicide at Smith's house, and by Dudley in the shooting of Hardimon. Officer Conway testified that all the shell casings seized matched each other, "so they were positive and definitely fired from the same firearm."

Finally, the State called Hardimon to testify how the shooting affected his life. He stated that he still had problems breathing and back pains. In addition, Hardimon described how the shooting increased his stress and affected his relationship with his girlfriend and his children.

The defense noted Defendant had been tried and acquitted of the charges from the two prior incidents. A jury acquitted Defendant of the charges related to the incident on April 16, 2001. Another jury acquitted Defendant of the charges related to the incident on November 2, 1999.

Additionally, the defense called Robert Steele ("Steele"), who had been Bowman's attorney. Steele testified that during Bowman's trial, Massie testified that Defendant was the man who shot him. However, when asked to point out the individual who shot him in court, Massie identified Bowman. The defense also called Angela Roberson ("Roberson") who testified to Defendant's character. Roberson said that Defendant was a "very caring and concerned young man with a big heart, always willing to go the extra mile to help someone out."

After the closing arguments, the jury recommended a sentence of life imprisonment for first degree assault, thirty years for armed criminal action, and fifteen years for attempted first degree robbery. The court imposed the recommended sentences and ordered that they be served consecutively.

STANDARD OF REVIEW

The trial court has broad discretion in admitting evidence, and its decisions will be affirmed on appeal absent an abuse of discretion. *State v. Anglin,* 45 S.W.3d 470, 472 (Mo. App. W.D. 2001). Abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Moore*, 88 S.W.3d 31, 36 (Mo. App. E.D. 2002).

DISCUSSION

In his sole point relied on, the Defendant argues that the trial court erred by allowing the State to introduce evidence of acquitted crimes during the penalty phase of the trial. Section 557.036.3,[1] as amended in 2003, states:

If the jury at the first stage of a trial finds the defendant guilty of the submitted offense, the second stage of the trial shall proceed. The issue at the second stage of the trial shall be the punishment to be assessed and declared. Evidence supporting or mitigating punishment may be

[1] All statutory references are to RSMo. 2004, unless otherwise indicated.

presented. Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and the *history and character of the defendant* (emphasis added).

As a general rule, the trial court has discretion during the punishment phase of trial to admit whatever evidence it deems helpful to the jury in assessing punishment. *State v. Winfield,* 5 S.W.3d 505, 515 (Mo. banc 1999); *State v. Kinder,* 942 S.W.2d 313, 331 (Mo. banc 1996). The Missouri Supreme Court has repeatedly held that both the State and the defendant may introduce any evidence pertaining to the defendant's character in order to help the jury assess punishment in a penalty phase setting. *State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005). Furthermore, even evidence of a defendant's prior unadjudicated criminal conduct may be heard by the jury in the punishment phase of a trial. *Winfield*, 5 S.W.3d at 515; *see also State v. Ferguson*, 20 S.W.3d 485, 500 (Mo. banc 2000) (holding that admitting unadjudicated bad acts during the penalty phase did not violate due process).

In this case, the jury found Defendant guilty of first degree assault, armed criminal action, and attempted robbery. Afterwards, during the penalty phase of the trial, the State introduced evidence that Defendant shot five other individuals, killing four of them; three in a triple homicide, one in a separate incident. The State also introduced evidence that all those individuals were shot with the same gun that Defendant used to shoot Hardimon. Defendant stood trial for these shootings in two separate trials and was acquitted both times. In open court, the trial court took judicial notice of Defendant's earlier acquittals.

The State introduced Defendant's previous acquittals during the second phase of the trial to support the State's request that Defendant be sentenced the maximum terms available for his crimes, not to determine whether Defendant was guilty of shooting Hardimon. Whether the State can introduce evidence of Defendant's previous acquittals during the penalty phase is an issue of first impression. There is no Missouri case law on this matter.

The United States Supreme Court, however, directly addressed this issue in *United States v. Watts*, 519 U.S. 148 (1997). In *Watts*, the Court found that an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. *Id.* at 157. *Watts* also held that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence. *Id.*

The Court based its holding, in part, on the 18 U.S.C. Section 3661, which provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." *See Watts*, 519 U.S at 151. Much like the U.S. Code, the Missouri Revised Statutes allow the sentencing trial court to consider "[e]vidence supporting or mitigating punishment."[2] Under Section 557.036.3, "[s]uch evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the

[2] Section 557.036.3.

victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant."

In *Watts*, the Supreme Court reasoned that an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt. 519 U.S. at 155. An acquittal is not a finding of any fact. *Id.* An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. *Id.* Without specific jury findings, no one can logically or realistically draw any factual finding inferences. *Id.* As such, the Court held that an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. *Id.*; *Dowling v. United States*, 493 U.S. 342, 349 (1990).

In *Jaco*, the Missouri Supreme Court held that the punishment phase of a trial is generally subject to a lower standard of proof than the guilt phase of the trial. 156 S.W.3d at 780. In *Jaco*, the defendant's 20-year sentence was within the original, unenhanced range of punishment, which was 10 to 30 years or life imprisonment for abusing a child and causing the death of her thirteen-month-old child. *Id.* at 777, 780. In *Jaco*, the court found that neither *Ring v. Arizona*, 536 U.S. 584 (2002) nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000) held that a jury is required to find facts beyond a reasonable doubt to impose a sentence that is within the unenhanced range of punishment for an offense. *Id.* at 780.

Instead, under *Ring* and *Apprendi*, facts that are the functional equivalent of elements of offenses, such as a

statutory aggravating circumstance that is required for eligibility for the death penalty, must be found beyond a reasonable doubt. *Id.*; *see also Ring*, 536 U.S. at 602; *Apprendi*, 530 U.S. at 482-83. The Missouri Supreme Court held that since the defendant's sentence was within the original unenhanced range of punishment, any facts that would have tended to assess her punishment within that range were not required to be found beyond a reasonable doubt by a jury. *Jaco*, 156 S.W.3d at 780-81.

Much like the defendant in *Jaco*, Clark's sentences were within the original unenhanced range of punishment. The jury found Clark guilty of one count of assault in the first degree, a Class A felony, one count of armed criminal action, an unclassified felony, and one count of attempted robbery in the first degree, a Class B felony. The authorized term of imprisonment for a Class A felony is "a term of years not less than ten years and not to exceed thirty years, or life imprisonment." Section 557.011.1(1). The authorized term of imprisonment for a Class B felony is "a term of years not less than five years and not to exceed fifteen years." Section 557.011.1(2). Under Section 571.015.1, an individual convicted of armed criminal action shall be punished by imprisonment by the department of corrections and human resources for a term of not less than three years. The statute specifies a minimum sentence of three years but does not state a maximum penalty. *State v. Norton*, 949 S.W.2d 672, 678 (Mo. App. W.D. 1997). The absence of a state maximum penalty merely indicates a legislative intent that a defendant convicted of the offense may be sentenced to any term of years above the minimum, including life. *Thurston v. State*, 791 S.W.2d 893, 895 (Mo. App. E.D. 1990). Since Clark was sentenced to life imprisonment on the count of

assault in the first degree, thirty years on the count of armed criminal action, and fifteen years on the count of attempted robbery, all the sentences were within the original unenhanced range of punishment.

In view of the fact that Clark did not receive enhanced sentences, any facts that would have tended to assess his punishment within that range were not required to be found beyond a reasonable doubt by a jury. Since those facts were subject to a lower standard of proof than beyond a reasonable doubt, the State was not precluded from introducing evidence of Clark's prior acquittals during the penalty phase of the trial. *See Watts*, 519 U.S. at 155. As the United States Supreme Court reasoned in *Watts*, "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. As such, the trial court did not err by allowing the State to introduce evidence of Defendant's prior acquittals during the penalty phase of the trial.

Point denied.

Judgment affirmed.

Separate Opinion: None